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IN THE

Supreme Court of the United States

October Term, 1971

NO. 71-1466

RICHARD WILLIAM GORSALITZ, *Petitioner*

v.

OLIN MATHIESON CHEMICAL CORPORATION, *Respondent*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions below are as presented in the Petition. The second opinion of the United States Court of Appeals for the Fifth Circuit and its Order overruling Motion for Rehearing and for Rehearing En Banc is now reported at 456 F.2d 180.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED

The questions which Petitioner would have this Court review apparently can be reduced to the following:

A. Is the remittitur practice in federal courts a violation of the Fifth and Seventh Amendments of the Constitution of the United States?

B. Was the particular remittitur ordered in this case justified?

We confess that we do not completely understand the multitude of convoluted variations of these questions as presented by Petitioner, but these two questions are at the foundation of them all.

STATEMENT OF THE CASE

This is a negligence suit for damages for personal injuries sustained by the Plaintiff-Petitioner Gorsalitz while he was engaged in the repair of electrical equipment at Defendant-Respondent Olin Mathieson Chemical Corporation's (Olin) plant in Lake Charles, Louisiana. Suit was brought against Olin in the United Statss District Court. Subsequently, Plaintiff's employer, the General Electric Company, was joined as a third party Defendant in an action for indemnity. There was also an intervention on behalf of Electric Mutual Liability Insurance Company seeking recovery of amounts paid under the Texas Workmen's Compensation Act.

The case was tried before a jury commencing on September 30, 1968. On October 10, 1968, the jury returned a verdict finding negligence on the part of Olin and awarding damages in the sum of $1,380,000.

Plaintiff then moved for a judgment on the verdict; Defendant Olin moved for judgment notwithstanding the verdict and in the alternative for a new trial based on excessiveness of the verdict; and third party Defendant General Electric moved to dismiss the third party complaint, or in the alternative, for a directed verdict on the third party complaint in its favor.

In an opinion rendered on March 20, 1969, the United States District Court, Judge Joe Ingraham presiding, ruled in favor of third party Defendant General Electric, denied Olin's Motion for Judgment Notwithstanding the Verdict, found the jury verdict excessive, granted Olin's Motion for New Trial unless the Plaintiff remit a sufficient amount to reduce the award to $690,633.

Petitioner Gorsalitz voluntarily accepted the remittitur "under protest" and both parties appealed from the final judgment. The United States Court of Appeals for the Fifth Circuit, in its June 17, 1970 opinion, 429 F.2d 1033, affirmed the trial court's judgment insofar as Olin's appeals against both Gorsalitz and General Electric were concerned. It further found that the granting of a remittitur did not violate the Seventh Amendment, and it found that *in this case* there was a sufficient factual and legal basis to justify a remittitur.

The Fifth Circuit did find, however, that the trial court had used the wrong standard in determining the amount of remittitur, and remanded the case for a recomputation

of the remittitur based upon "the highest amount which the jury could properly have awarded." 429 F.2d at 1046.

On March 27, 1971, Judge Ingraham, sitting by designation, proceeded to determine "the maximum amount, upon the evidence presented, which the jury could reasonably find to be compensatory of the Plaintiff's loss."[1] Applying that Fifth Circuit standard, he found again that the verdict was excessive in view of the evidence, and he found that the maximum damages which could be justified by the evidence was $887,029.

Again Gorsalitz voluntarily accepted the remittitur "under protest" and appealed once more. By this time the Intervenor, Electric Mutual Liability Insurance Company, had accepted out of the proceeds of this judgment that had been tendered into the Registry of the Court on behalf of Olin the amount awarded to it by the trial court's second judgment, and for that reason it is no longer a party to this action. The new panel of the Fifth Circuit affirmed, holding that they could not "say as to any one element of damages, or as to the total, that the judge abused his discretion in his application of the standard mandated . . . ." 456 F.2d at 181. The Court modified the judgment in only one minor respect. Obviously examing the evidence in great detail,[2] the Fifth Circuit increased the judgment by $2,737, finding that the trial court in determining

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1. Petition, Appendix B, at 45.

2. The Court of Appeals in this review went at rather extraordinary lengths to examine the evidence upon which the damages were computed. For example, the Court of Appeals determined the trial court had arrived at the correct amount of future dental expenses ($1,900) even though "we disagree with his method of calculating." 456 F.2d at 181, fn. 5.

lost wages from injury to the date of trial, had failed to consider increases in earnings of other employees in Gorsalitz' job assignment.

Gorsalitz has now filed his Petition for Writ of Certiorari, raising again the same time-worn complaints that have been considered by the Court of Appeals and the District Court so many times in this case alone.

ARGUMENT

I. The law is well established that the federal remittitur practice is a sound judicial procedure and is constitutional.

Petitioner has been unable to cite any authority which casts any doubt upon the constitutionality of the procedure utilized in this case. He vaguely makes reference to the Seventh Amendment to the United States Constitution, and would have this Court somehow reach the conclusion that when a trial court reduces damages to the maximum amount a jury could, in accordance with the evidence, assess, the function of a jury is usurped.

This attack has often been attempted in the years since Justice Story handed down his landmark decision in *Blunt v. Little* (CCD Mass. 1822) 3 Fed. CAS 760, No. 1578, 3 Mason 102. There, the jury returned a verdict for $2,000 damages for injuries suffered as a result of a malicious arrest. Upon defendant's motion for new trial, Justice Story directed that the cause be submitted to another jury unless Plaintiff were willing to remit $500 of the damages. The Plaintiff remitted that amount. and the motion was denied.

This Court first approved that practice in *Northern Pacific Railroad Company v. Herbert*, 116 U.S. 642 (1886), stating:

> The exaction, as a condition of refusing a new trial, that the plaintiff should remit a portion of the amount awarded by the verdict was a matter within the discretion of the court. It held that the amount found was excessive, but that no error had been committed on the trial. In requiring the remission of what was deemed excessive it did nothing more than require the relinquishment of so much of the damages as, in its opinion, the jury had improperly awarded. The corrected verdict could, therefore, be properly allowed to stand. 116 U.S. at 646-47.

The first head-on constitutional attack on remittitur was in *Arkansas Valley Land and Cattle Company v. Mann*, 130 U.S. 69 (1889). There, this Court considered the same arguments made here and concluded:

> The practice which this court approved in *Northern Pacific Railroad v. Herbert* is sustained by sound reason, and does not, in any just sense, impair the constitutional right of trial by jury. It cannot be disputed that the court is within the limits of its authority when it sets aside the verdict of the jury and grants a new trial where the damages are palpably or outrageously excessive. *Ducker v. Wood*, 1 T.R. 277; *Hewlett v. Crutchley*, 5 Taunt. 277, 281; authorities cited in Sedgwick on Damages, 6th ed. 762, note 2. But, in considering whether a new trial should be granted upon that ground, the court necessarily determines, in its own mind, whether a verdict for a given amount would be liable to the objection that it was excessive. The authority of the court to determine whether the damages are excessive implies authority to determine when they are not of that character. *Id.* at 74.

An unbroken line of legal precedent has followed the rationale of *Arkansas Cattle Co. v. Mann, supra,* including numerous U. S. Supreme Court cases such as *Kennon v. Gilmer,* 131 U.S. 22 (1889); *Clark v. Sidway,* 142 U.S. 682 (1892); *Hansen v. Boyd,* 161 U.S. 397 (1896); *German Alliance Insurance Company v. Hale,* 219 U.S. 307 (1911) *Gila Valley, G. & N. Ry. Co. v. Hall,* 232 U.S. 94 (1914); *Union Pacific Railroad Co. v. Hadley,* 246 U.S. 330 (1918).

A recent pronouncement by this Court was in *Linn v. United Plant Guard Workers of America,* 383 U.S. 53 (1966), involving damages in a libel suit. There, this Court said:

> . . . the amount of damages which may be recovered depends upon evidence as to the severity of the resulting harm. . . . If the amount of damages awarded is excessive, it is the *duty* of the trial judge to require a remittitur or a new trial. *Id.* at 65-66 (emphasis supplied).

As one commentator stated, the remittitur practice in federal courts "has become so universal in the trial and even the appellate courts and has the apparent approval of so many Supreme Court cases, that it cannot be contended that its use is unconstitutional without a judicial uprooting of precedent akin to that effected by *Erie-Tompkins.*" 6A Moore, FEDERAL PRACTICE Sec. 59.05[3], at 3739-40 (2d ed. 1971). Moreover, if there were no remittitur practice, every excessive verdict would require a new trial, even when there are no other irregularities in the original trial.

Petitioner Gorsalitz' attack on the constitutionality of remittitur is thus patently without merit, and, we submit,

does not present sufficient grounds for granting a writ of certiorari.

II. The Court of Appeals for the Fifth Circuit has determined that the facts sufficiently justify this precise remittitur; there is no justification for this Court to again review those facts.

It should be noted at the outset, that only in the Fifth Circuit is there authority permitting a Plaintiff such as Petitioner here to accept a remittitur voluntarily, "under protest" or otherwise, and then obtain a review of the trial court's actions. This Court and all of those circuit courts which have passed upon the question have held that such an appellate review is not available once a remittitur is accepted. See *United States v. 1160.96 Acres of Land,* 432 F.2d 910 (5th Cir. 1970); *Minerals & Chemicals Philipp Corp. v. Milwhite Co.,* 414 F.2d 428 (5th Cir. 1969); and *Steinberg v. Indemnity Ins. Co. of North America,* 364 F.2d 266 (5th Cir. 1966). Contra, *Woolworth v. Chesbrough,* 244 U.S. 79 (1917); *Koeningsberger v. Richmond Silver Mining Co.,* 158 U.S. 41 (1895); *Lewis v. Wilson,* 151 U.S. 551 (1894); *Kennon v. Gilmer,* 131 U.S. 22 (1889); *Mattox v. News Syndicate Co.,* 176 F.2d 897 (2d Cir. 1949); *Movible Offshore Co. v. Orsly,* 346 F.2d 870 (5th Cir. 1965); *Delta Engineering Corp. v. Scott,* 322 F.2d 11 (6th Cir. 1963); *Bristol Gas & Electric Co. v. Boy,* 261 F. 297 (6th Cir. 1919); *Collum v. Butler,* 421 F.2d 1257 (7th Cir. 1970); *Rothschild v. Drake Hotel, Inc.,* 397 F.2d 73 (7th Cir. 1968); *Dorin v. Equitable Life Ass. Soc. of the United States,* 382 F.2d 73 (7th Cir. 1967); *Casko v. Elgin, Joliet and Eastern Ry. Co.,* 361 F.2d 748 (7th Cir. 1966); and *S. Birch & Sons v. Martin,* 244 F.2d 556 (9th Cir. 1957).

Petitioner, having voluntarily accepted the remittitur "under protest", has obtained such a review of the possible abuse of discretion by the trial court, unavailable in the other circuits, and he has done it, not once, but *twice*, by two different panels of judges of the Fifth Circuit. While it is not now urged by Respondent that this Court take up this conflict in law among the Circuits, the fact that such a review is unavailable elsewhere does have a bearing upon whether Petitioner's rights have been abused such that this Court should grant a writ of certiorari.

Petitioner's entire argument is premised upon three erroneous assumptions: First, that the jury verdict of $1,380,000 was fully supported by the evidence; Secondly, that no court has ever determined that the verdict was not supported by the evidence; and Thirdly, that the remittitur was required for some reason other than the failure of the evidence to support the verdict.

At no time has any court said that the evidence supported the verdict. Four times the lower courts have passed on the very question of whether the evidence in this case did support the jury verdict, and four times, they said it did not.[3]

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3. "[i]t is the Court's opinion that $889,367 allocable to pain and suffering is excessive, the result of undue sympathy on the part of the jury." Petition, Appendix A, at 39. (District Court, March 20, 1969)

. . .

"We think that the trial judge, in the exercise of his necessarily broad discretion, could properly find that *some* part of this large verdict resulted from undue sympathy on the part of the jury. We hold, therefore, that the District Court did not err in conditionally requiring *some remittitur*. . . ." 429 F.2d at 1046 (emphasis in original) (Fifth Circuit, June 7, 1970).

"The Court continues in its belief that the verdict was excessive, the result of undue sympathy on the part of the jury.

"The damages above discussed and found by the Court to be the maximum figure which a reasonable jury could award under the evi-

After all this, Petitioner now wants the United States Supreme Court to evaluate the evidence once again. It is not the function of the Supreme Court to re-examine the facts in evidence, as Petitioner would have it do, in order to determine again if the remittitur were justified.

> "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."
>
> *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

While there is general authority, as above, that this Court will not re-examine facts determined by two courts below, and that this Court will not ordinarily review the failure of the trial court to grant a new trial because of excessiveness or inadequacy of the verdicts below, *Fairmount Glass Co. v. Cub Fork Coal Co.*, 287 U.S. 474 (1933), there appears to be practically no authority on the scope of review where plaintiff has accepted a remittitur and judgment has been entered thereon. This situation is clearly the result of the line of authority cited above to the effect that once a plaintiff (as here) has voluntarily accepted a remittitur, he has waived his right to have the amount of judgment examined by an appellate court.

It should also be kept in mind that if one is to examine a trial judge's denial or granting of a motion for new

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dence presented totaled $887,029." Petition, Appendix B, at 44-45. (District Court, March 26, 1971)
"In all other respects we cannot say as to any one element of damages, or as to the total, that the Judge abused his discretion in his application of the standard mandated by this Court." 456 F.2d at 181. (Fifth Circuit, February 4, 1972)

trial because of the amount of the verdict, the scope of review by appellate courts is necessarily narrow. The ruling on such a motion is within the sound discretion of the trial court, and can only be set aside when there is clear and grave abuse of discretion. *Fairmount Glass Works v. Cut Fork Coal Co.*, 287 U.S. 474 (1933).

Appellate Courts in the United States have historically given great deference to the trial judge, who has had the opportunity to observe the witnesses and consider the evidence in the context of a living trial rather than upon a cold record. See, e.g., *Taylor v. Washington Terminal Co.*, 409 F.2d 145 (D.C. Cir. 1969); *Delta Engineering Co. v. Scott*, 322 F.2d 11 (5th Cir. 1963), cert. denied 377 U.S. 905; 6A J. Moore, FEDERAL PRACTICE, Sec. 59.95[5] at 3756-58 (2d ed. 1971); Wright, The Doubtful Omniscience of Appellate Courts, 41 Minn. L. Rev. 751 (1951).

In recognizing that the trial court is better equipped to rule on questions of excessive damages, appellate courts have properly limited their review of that court's actions to cases where there is a clear showing of grave abuse of discretion. For example, in *Houston Coca-Cola Bottling Co. v. Kelley*, 131 F.2d 627 (5th Cir. 1942), the Court stated:

> "The duty of granting a new trial in a jury case for, or otherwise correcting, excessiveness in fact in a verdict, is exclusively that of the trial judge, and the granting or denial of a new trial on the ground of excessive damages is a matter of discretion with the trial court, not subject to review except for grave abuse of discretion. *Id.* at 628.

The Fifth Circuit, in its second review of the trial court's action in this case, specifically found no such abuse of discretion.

The so-called "Rules for Establishing Excessiveness" set out on page 19 of the Petition, it should be pointed out, are not standards which were used by any of the courts here involved, but rather are the imaginative concoctions of Petitioner, viewing the Court's actions through his own extraordinarily distorted prism. The Honorable Judge Joe Ingraham made quite clear the standard he was using. He was determining the maximum amount of money a jury, viewing *this* evidence in *this* case, could reasonably award.[4] It is difficult to imagine that he abused his discretion in awarding Gorsalitz nearly $900,000, plus interest of 6% per annum from the date of the verdict (October 10, 1968).

Gorsalitz spends much time alleging that other courts, at other times, have awarded more damages than here. Petitioner cites private information, rumors, newspaper publications and statistics he was never able to introduce into evidence, many not having existed at the time of trial. Such material should not be considered by any Court and Respondent has no way of knowing the truth of these matters, nor what the final disposition of them was. The award here must be based on the evidence in this case, and only that is relevant.

Petitioner is basically complaining that one trial judge in one isolated case should have given him more money. Certainly no important legal issues or matters of public policy are present. A review by this Court of the amount of money awarded Gorsalitz would affect no parties other than the litigants in this lawsuit.

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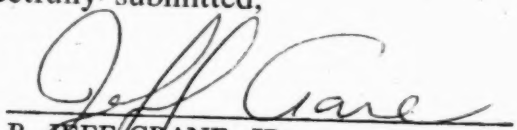
4. See p. 9 supra, fn. 3.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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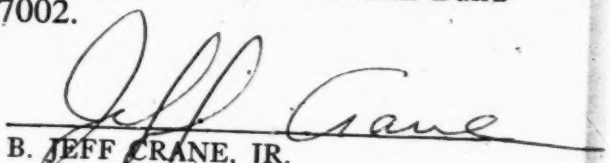
CERTIFICATE OF SERVICE

True and correct copies of the foregoing Brief have been served upon Mr. John H. Holloway, 12600 Memorial Drive, Suite 208, Houston, Texas 77024 and Mr. Vincent Rehmet, Barrow, Bland & Rehmet, 1212 The Main Building, Houston, Texas 77002.



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